

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION**

CASE NO.: 2:20-cv-02167

KATHLEEN ELAM,

Plaintiff,

v.

ZAZZLE INC.,

Defendant.

COMPLAINT FOR COPYRIGHT INFRINGEMENT
(INJUNCTIVE RELIEF DEMANDED)

Plaintiff KATHLEEN ELAM by and through her undersigned counsel, brings this Complaint against Defendant ZAZZLE INC. for damages and injunctive relief, and in support thereof states as follows:

SUMMARY OF THE ACTION

1. Plaintiff KATHLEEN ELAM (“Elam”), who resides in Memphis, Tennessee, brings this action for violations of exclusive rights under the Copyright Act, 17 U.S.C. § 106, to copy and distribute Elam's original copyrighted works of authorship.

2. Plaintiff is a professional photographer who specializes in photographs of hummingbirds, an extremely difficult branch of avian photography to successfully execute due to the subjects’ small size, speed of flight, and shyness. Plaintiff sells her artwork at art shows or online via her website at <https://hummingbirdhangout.com>. Plaintiff has won numerous awards for her artwork. She is a juried artist, displaying her artwork at prestigious shows in Laguna Beach, CA and Newport Beach, CA, among others. Ms. Elam has also shown her work in various galleries in Southern California and has had her images printed in birding magazines and

SRIPLAW

21301 POWERLINE ROAD, SUITE 100, BOCA RATON, FLORIDA 33433

in calendars. Plaintiff's signature can be found on the front of each of her photographs, no matter where they are displayed. Ms. Elam makes her signature a permanent part of each of her photographs.

3. Plaintiff has dedicated years of work and thousands of dollars to acquire the skills and equipment necessary to successfully produce exceptional quality images of hummingbirds. For example, Ms. Elam spent months learning how to photograph hummingbirds before being able to capture one with wings frozen in mid-air. On Ms. Elam's website she currently sells her artwork as prints but also offers a select variety of household items, including pillows, placemats, phone covers and cutting boards. Ms. Elam has licensed her photographs to a greeting card company for exclusive use on greeting cards. Plaintiff's photographs have also been licensed to various publications for one-time use.

4. Defendant ZAZZLE, INC. ("Zazzle") sells "print on demand" apparel and products on its website at www.zazzle.com.

5. Plaintiff alleges that Zazzle copied Elam's copyrighted works to advertise, market and promote its business activities. Zazzle committed the violations alleged in connection with Zazzle's business for purposes of advertising and promoting sales to the public in the course and scope of the Zazzle's business.

JURISDICTION AND VENUE

6. This is an action arising under the Copyright Act, 17 U.S.C. § 501.

7. This Court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331, 1338(a).

8. Defendant is subject to personal jurisdiction in California.

9. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) and 1400(a) because defendant's wrongful conduct caused harm to plaintiff in this district, Defendant resides in this district, and Defendant is subject to personal jurisdiction in this district.

DEFENDANT

10. Zazzle Inc. is a California corporation with a principle place of business in Redwood City, California.

11. Zazzle, Inc. owns and operates the website www.zazzle.com.

12. Founded in 1999, but publicly launched in 2005, Zazzle is an e-Commerce vendor that allows users to upload images of artwork, slogans, and designs for printing by Zazzle on products such as shower curtains, magnets, postcards, water bottles, travel bags, coffee mugs, travel posters, pillows, placemats and t-shirts.

13. As of October 2019, Zazzle offered 1,534 customizable items for sale to the public.

THE COPYRIGHTED WORKS AT ISSUE

14. The following works are at issue in this case and are referred to herein as the "Works." The registration certificates for the Works referenced below are attached hereto as Exhibit 1.

15. "Bird, James Bird", a photograph of a colorful hummingbird in mid-air against a white background, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

16. "Blue Orchid Feast", a photograph of a hummingbird visiting a blue orchid, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

17. “Dreamsicle”, a photograph of a hummingbird visiting an orange and white aster, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

18. “Gerbera Daisies #6”, a photograph of a hummingbird visiting a pink gerber daisy, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

19. “Gorgeous Redhead”, a photograph of a red headed hummingbird landing on a pink lily, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

20. “Green Goddess”, a photograph of a hummingbird visiting various flowers, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

21. “Guarding The Tulips”, a photograph of a hummingbird and pink tulips, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

22. “Lily Pad”, a photograph of a hummingbird perched on a pink lily, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

23. “Orchid Attraction”, a photograph of a hummingbird and orange and yellow orchids, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

24. “Orchid Attraction 2”, a photograph of a hummingbird visiting pink and white orchids, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

25. “Secret Garden #1”, a photograph of a hummingbird sitting on an aster stem, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

26. “Secret Garden #4”, a photograph of a hummingbird sitting on an aster stem, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

27. “Secret Garden #5”, a photograph of a hummingbird sitting on an aster stem, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

28. “Special Moment”, a photograph of a hummingbird visiting a red poppy, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

29. “Taking Turns”, a photograph of three hummingbirds visiting orange daylilies, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

30. “The Boss”, a photograph of a hummingbird on a post, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

31. “Time To Taste The Tulips”, a photograph of a hummingbird visiting a pink tulip, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

32. “Zen”, a photograph of a hummingbird and a yellow and red rose, was registered with the U.S. Copyright Office effective October 15, 2015 and bears Registration Number VA 1-992-715.

33. “Paradise Found”, a photograph of a hummingbird visiting a bird-of-paradise flower, was registered with the U.S. Copyright Office effective January 24, 2016 and bears Registration Number VA 1-986-351.

34. “Shelter From The Rain”, a photograph of a hummingbird on a leaf in the rain, was registered with the U.S. Copyright Office effective January 24, 2016 and bears Registration Number VA 1-986-351.

35. “A Little Privacy Please”, a photograph of a hummingbird in mid-air with head turned to the camera, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

36. “Camouflage”, a photograph of a hummingbird on an orange bougainvillea flower, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

37. “Christmas Angel”, a photograph of a hummingbird above Christmas decorations, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

38. “Gossamer Wings”, a photograph of a hummingbird visiting a pink flower, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

39. “Looking Up”, a photograph of a hummingbird and purple flowers, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

40. “Orchid Attraction 4”, a photograph of a hummingbird on an orange bougainvillea flower, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

41. “Private Moment”, a photograph of a hummingbird and a pink flower, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

42. “Seasons Greeting”, a photograph of a hummingbird and a Christmas ornament, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

43. “Sweet Spot”, a photograph of a hummingbird and a bird-of-paradise flower, was registered with the effective January 12, 2017 and bears Registration Number VA 2-065-626.

44. “Trumpet Creeper”, a photograph of a hummingbird visiting a trumpet flower, was registered with the U.S. Copyright Office effective January 12, 2017 and bears Registration Number VA 2-065-626.

INFRINGEMENT BY DEFENDANT

45. In November of 2016, plaintiff agreed to be a Zazzle “designer.”

46. In order to become a Zazzle designer, plaintiff accepted the Zazzle User Agreement and the Zazzle Designer License Agreement attached hereto as Exhibit 2.

47. Pursuant to the Zazzle Designer License Agreement, plaintiff granted Zazzle a nonexclusive license to reproduce, display, sell and distribute her Works, but plaintiff retained the right to cancel the agreement and terminate the license upon notice to Zazzle.

48. After agreeing to the Designer License Agreement, plaintiff uploaded the Works to Zazzle.

49. On November 20, 2017, Plaintiff terminated the Designer License Agreement by written notice to Zazzle, copies of which are attached hereto as Exhibit 3.

50. Despite written notice to Zazzle, Zazzle failed to comply with the Designer License Agreement and cease reproducing, displaying, selling and distributing the Works.

51. In April 2019, plaintiff discovered that her Works were still for sale almost a year and a half after closing her Zazzle account and being assured that the account was closed.

52. Zazzle is not entitled to safe harbor or other defense pursuant to 17 U.S.C. § 512 in this action.

53. Zazzle copied, displayed, sold and distributed plaintiff's works without permission or authority.

COUNT I **COPYRIGHT INFRINGEMENT**

54. Plaintiff incorporates the allegations of paragraphs 1 through 53 of this Complaint as if fully set forth herein.

55. Elam owns valid copyrights in the Works at issue in this case.

56. Elam registered the Works at issue in this case with the Register of Copyrights pursuant to 17 U.S.C. § 411(a).

57. Zazzle copied, displayed, and distributed the Works at issue in this case and made derivatives of the Works without Elam's authorization in violation of 17 U.S.C. § 501.

58. Zazzle performed the acts alleged in the course and scope of its business activities.

59. Zazzle's acts were willful.

60. Elam has been damaged.

61. The harm caused to Elam has been irreparable.

WHEREFORE, the Plaintiff prays for judgment against the Defendant Zazzle, Inc. that:

a. Defendant and its officers, agents, servants, employees, affiliated entities, and all of those in active concert with them, be preliminarily and permanently enjoined from committing the acts alleged herein in violation of 17 U.S.C. § 501;

b. Defendant be required to pay Plaintiff her actual damages and Zazzle's profits attributable to the infringement, or, at Plaintiff's election, statutory damages, as provided in 17 U.S.C. § 504;

c. Plaintiff be awarded her attorneys' fees and costs of suit under the applicable statutes sued upon;

d. Plaintiff be awarded pre and post-judgment interest; and

d. Plaintiff be awarded such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues so triable.

DATED: March 6, 2020

Respectfully submitted,

/s/Joel B. Rothman

JOEL B. ROTHMAN

Florida Bar Number: 98220

joel.rothman@sriplaw.com

SRIPLAW

21301 Powerline Road

Suite 100

Boca Raton, FL 33433

561.404.4350 – Telephone

561.404.4353 – Facsimile

Attorneys for Plaintiff Kathleen Elam